No. 13942

United States Court of Appeals

FOR THE NINTH CIRCUIT.

CHARLES SIMON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

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May It Please the Court:

What has been said in the reply brief for appellant in *Albert Clementino* v. *United States of America,* No. 13918, filed in this Court, will be referred to here rather than repeat what was there said.

I.

Appellee makes the argument, at page 8 of its brief, that the classification by the draft boards is final even

though erroneous. This is not exactly a full statement of the facts. It is true so long as the appellee can show some contradiction or dispute in the administrative record. In the absence of such dispute of fact, it cannot be said that there is a question of fact involved. Since there in no question of fact involved, and the classification is contrary to the facts showing exemption, there is no basis in fact and the draft boards are without jurisdiction.—*Estep* v. *United States,* 327 U. S. 114; *Dickinson* v. *United States,* 346 U. S. 389, 74 S. Ct. 152; *Schuman* v. *United States,* — F. 2d — (9th Cir. Dec. 21, 1953); *Jewell* v. *United States,* — F. 2d — (6th Cir. Dec. 22, 1953); *United States* v. *Hartman,* — F. 2d — (2d Cir. Jan. 8, 1954).

II.

The argument is made by the appellee, at page 9 of its brief, that it is necessary to have the draft boards sustain the claim in order for it to be good. This statement flies in the teeth of the fundamental proposition that if a claim is not sustained and there is no basis in fact for the classification it is invalid.

III.

The appellee argues, at page 9 of its brief, that it is necessary for a registrant to show his character incidental to the conscientious objector claim. The statute does not make the character of the conscientious objector a relevant inquiry. This has been adequately answered in the reply brief in the *Sterrett* case (No. 13901 on the docket of this Court) under Point I.

IV.

The appellee argues, at page 11 of its brief, that the draft boards are free to determine how and when a registrant is qualified for classification as a conscientious objector. This argument must be qualified by the provisions of the act and regulations. If the draft boards act in

defiance of these, then it cannot be said that the boards are left free to determine such questions. The discretion of the boards is limited by law.

V.

At page 12 of its brief the appellee makes the general argument—as it does in the companion cases—that a reading of the Selective Service file indicates that there is basis in fact. The appellee nevertheless fails to refer to any such parts of the file that prove the point relied on. Appellee says that the classification is not shown to be arbitrary and capricious. The I-A-O classification in the face of the conscientious objector form showing opposition to participation in both combatant and noncombatant military service shows definitely that the classification is arbitrary and capricious on its face. For answer to this argument of appellee, see pages 16-22 of main brief in companion case of *James Rolland Francy* v. *United States of America,* No. 13940, filed in this Court.

The fact that the conscientious objector status was sustained only as to combatant military service and he was ordered to do noncombatant military service proves an arbitrary and capricious compromise of the full conscientious objector status contrary to the facts and law.

VI.

It is argued by appellee, at page 12 of its brief, that it is difficult for the hearing officer to put down on paper his reasons for his recommendations, because "conscientious objection is a state of mind, an intangible item." That this is so does not mean that Congress freed the draft boards and the Department of Justice from the rules of law and of reason. It does not give license to administrative officials to defy the law. Unless an administrative officer can give reasons for his decision and base them upon facts he has acted arbitrarily and capriciously. That the conscientious objector status pertains

to the mind of the individual is entirely immaterial and irrelevant. The sole question is: Does the undisputed evidence show that the registrant is a conscientious objector according to the definition appearing in the act? The fact that the hearing officer has difficulty in sustaining his illegal action does not validate the illegality of his action.

VII.

Appellee says, at page 12 of its brief, that the hearing officer had an opportunity to observe the registrant. From this it can be assumed that the contention is that an issue of credibility was present. There is no evidence that the hearing officer doubted the credibility of Simon. Indeed the contrary appears. In the absence of a specific finding that the hearing officer questioned Simon's credibility, it cannot be injected into the case for the first time by way of speculation.—*Dickinson* v. *United States,* 346 U. S. 389, 74 S. Ct. 152; *Schuman* v. *United States,* — F. 2d — (9th Cir. Dec. 21, 1953). See also answer to the argument under Point IX of the reply brief in companion case of *Albert Clementino* v. *United States of America,* No. 13918.

VIII.

Appellee asserts, at pages 13-14 of its brief, that the appellant had the opportunity to mail information to the local board to be placed in his file, and that this right constituted a waiver of any failure to accord procedural due process of law.

It should be remembered that the registrant was denied the right to discuss his classification. This was not cured by his right to write letters. Personal appearance is a vital right. (*Knox* v. *United States,* 200 F. 2d 398 (9th Cir.)) See also answer to the argument under Point VI of the reply brief in the companion *Clementino* case (No. 13918).

CONCLUSION

It is submitted that the judgment of the court below should be reversed and the appellant ordered acquitted.

Respectfully,

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